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COMMENTS

FUNCTION AND EFFECT OF WISCONSIN DEPARTMENT OF TAXATION INCOME TAX RULES

I. DEFINITION

While the tax lawyer is familiar with the word "regulation" as used in federal tax law, the word "rule," as used by practitioners in the administrative law field generally, has come to be the accepted term in Wisconsin tax practice. The revisions made by the 1955 Legislature in the Administrative Procedure Act included an amplified definition of "rule." "A rule means a regulation, standard, statement of policy or general order, of general application and having the effect of law, issued by an agency to implement, interpret, or make specific legislation enforced or administered by such agency or to govern the organization or procedure of such agency."¹ It seems that the Legislature has attempted to establish a common term which should be used by all concerned with Wisconsin tax practice.

However, a "rule" must be distinguished from a "ruling." In Wisconsin any interested person may petition for a declaratory ruling regarding the application *to him* of any statute or rule enforced by an agency.² The distinction lies in the broader scope of a rule.

II. THE FUNCTION OF RULES

The rise of administrative law has made great changes in the practice of law during the past fifty years. The reasons for this emergence may be briefly summarized as follows:

- A. A need for flexibility
- B. A need for expertness
- C. The detail of government operation

The development has, at times, been slow and labored because of the abuses and confusion that have crept in through careless legislation and uncertain decisions by the courts. This has been particularly true in the income tax field. Various attitudes toward tax administration have been promulgated from time to time in our tax history. In the early stages it was felt that the legislature could adequately handle both the making and administration of the tax law. Today the attitude of many writers in the administrative law and tax fields is that the primary duty of carrying out our tax laws must rest with an administrative agency rather than with the legislature. This attitude has been

¹ WIS. STATS. (1955) §227.01(3). Also see (4) and (5).

² WIS. STATS. (1955) §227.06 (emphasis added).

slow in gaining judicial acceptance. Eisenstein has summarized the result:

"But the very function of an administrative body is to shed light where legislation has deliberately or inadvertently left the affected area in darkness . . . The courts, which have no technical competence, have generally become the administrators. The administrative, which has the technical competence, has substantially become a mere party litigant before the judicial administrators."³

The Wisconsin Legislative Council, after much study and consideration of the authorities, stated:

"The committee also became impressed, however, with the necessity of delegating a certain amount of regulatory power to administrative agencies if complex social and economic problems are to be treated effectively. The legislature as a unit cannot possibly possess or acquire in each complex field of law the technical know-how, facility for continued supervision or time for detail which is possessed by an administrative agency operating in a single field of law."⁴

It is submitted that the 1955 Wisconsin Legislature has indicated that it favors a more clearly defined role for administrative agencies.

"There are certain rules which agencies should be able to make even though they are given no express rule-making authority by the statutory provisions relating to them. They probably have implied authority to make some of these rules from the fact that they are required to administer the law. For instance, an agency necessarily has to interpret statutory language in applying it to specific situations and over a period of time may develop general policies which it follows in its administration of the statute. Also when an agency has licensing or similar powers, it is proper that it should develop forms and procedures to govern applications and other matters. And when an agency disposes of a large number of matters on the same basis, it naturally develops certain policies to guide it in making these decisions. It should be clear that an agency has power to reduce such general policies to rule form and promulgate them as such. Thus, this section not only indicates those powers which any agency may possibly already possess, but it makes it clear that an agency has that authority so that no agency, for fear of lack of authority, should hesitate to promulgate as rules its procedures, interpretations, and general policies."⁵

This attitude of the Legislative Council raises the question of whether a particular agency has authority to make legislative as well as inter-

³ *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477 (1945).

⁴ SYNOPSIS OF RECOMMENDATIONS, WIS. LEGIS. COUNCIL, 1955 Report, Vol. II. Part I, p. i.

⁵ *Ibid.*, The reference in the quotation is to Section 227.014 which became law in 1956. Ch. 221, LAWS OF 1955. The quotation was part of the original Bill 5-S submitted to the Legislature.

pretative rules. One of the most important causes of uncertainty as to the validity of rules in the past has been the failure to distinguish between interpretative and legislative rules.

A digression must be made at this point into the nature of the two distinct types of rules, legislative and interpretative. These, unfortunately, have been somewhat confused by the federal courts, leading to further confusion on the part of the tax attorney. A recent analysis of the problem states:

"The theory appears clear at this point. Despite the lack of information provided by Congress and the studious avoidance of the practical truth by the courts, there are definitely two separate and distinct types of regulations."⁶

Other authorities, such as Dean Griswold and Professor Davis, agree that there are, in fact, two classifications of administrative rules.⁷ One of the federal tax services has divided them as follows:

1. "Legislative regulations—Congress gives to the Commissioner, by special delegation of legislative power, power to round out provisions which are purposely left incomplete."
2. "Interpretative regulations—These are permitted to clarify ambiguous or doubtful language in a statute, or to indicate the method of its application to special situations."⁸

In general, a rule will be legislative if the legislature has made a specific grant of power or has expressly left an area to be filled in by the administrative agency. These rules will be valid if:

1. "It is within the power of the legislature to delegate such matters."
2. "The agency does not exceed its authority in carrying out its program."
3. "The agency does not act arbitrarily or capriciously."⁹

All other rules, typically a clarification of a statutory ambiguity, are interpretative. These are valid as long as the agency remains within the boundaries of its duly created authority. Examples of these two types on the federal level are code Section 7805(a)¹⁰ which generally gives the Commissioner authority to prescribe needful rules for enforcement of the income tax law, Section 472(b)¹¹ which expressly directs the Commissioner to make rules in the area of inventory valuation, and Section 611(a)¹² which authorizes the Commissioner to establish "reasonable allowances of depletion and for depreciation." The

⁶ Comment, 23 U. OF CIN. L. REV. 332 (1954).

⁷ Davis, ADMINISTRATIVE LAW (1951), §55. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398 (1941).

⁸ *Federal Tax Coordinator*, Para. No. A-906 (1954).

⁹ Davis, ADMINISTRATIVE LAW (1955) §55.

¹⁰ 26 USCA (I.R.C. 1954) §7805(a).

¹¹ *Ibid.*, §472(b).

¹² *Ibid.*, §611(a).

first example at least authorize interpretative rules, while the latter two clearly authorize the creation of legislative rules. It is submitted that parallels of these sections can be found in the WISCONSIN STATUTES. Section 71.11(24)(a)¹³ is an approximate restatement of code Section 7805(a)¹⁴ cited above. There are also several Sections (71.035(1)(b), 71.03(1)(g), 71.07(5), 71.09(2m)(d), 71.11(44)(c), and 71.11(1))¹⁵ which are specific in their authorization of rules and are legislative in nature.

The key question for tax attorneys is this: Does the Wisconsin Department of Taxation have the power and authority to make both legislative and interpretative rules? The latter type may be disposed of quickly. It is clear that administrative agencies were given the power and authority to interpret and make legislation more specific, as seen in Sec. 227.014(2). This broad power and authority in the Administrative Procedure Act is applicable to all administrative agencies, and clearly grants to the agencies the right to promulgate interpretative rules. But there is no express grant of power to make legislative rules in Chapter 227. However, specific grants of power and authority in the chapters dealing expressly with the various agencies, such as those cited above, seem to be grants of authority to make legislative rules. It is the legislative rule which causes the greatest conflict of opinion, and this is justifiable. It is this power which would give the Department of Taxation a genuine position of leadership in future tax administration. It is submitted that the Department *should* occupy this position with a clearly defined authority to promulgate both interpretative and legislative rules. Regretably, however, the Legislature, in Chapter 227, did not distinguish between the two types of rules and the practitioner is left on his own, at least until an applicable decision is made by the Wisconsin Supreme Court, to decide whether the Department of Taxation has the power to promulgate legislative rules. When one takes into account the reasons given by the Legislative Council for the revisions of the Administrative Procedure Act, the statements of summation in the various chapters of the research report,¹⁶ and the recommendations of the Legislative Council, one gets the impression that the Legislature has in the past authorized both types of rules. As to the grant of power to make legislative rules, the Legislative Council recommends:

"... that the Legislature should exercise greater care in the future in delegating rule-making power to administrative agencies.

¹³ WIS. STATS. (1955).

¹⁴ *Supra*, n. 10.

¹⁵ WIS. STATS. (1955). Unless the text indicates otherwise, future section references are to the 1955 WISCONSIN STATUTES.

¹⁶ WIS. LEGIS. COUNCIL, 1955 Report, Vol. II, Part II. A particularly good example is found on p. 123 where the Report discusses the distinction between the two types of rules and their construction.

When contemplating future grants of rule-making power, the first question should be whether additional authority is needed by the agency; if it is needed, care should be taken to prescribe adequate standards and to limit the scope of the power which is being delegated."¹⁷

Whether the Legislature has already authorized legislative rules in Chapter 71 remains to be either verified or refuted in the future. It is not possible to predict how the Wisconsin Supreme Court will decide this key question because of the uncertainty of our judicial decisions. Our Court has often indicated its opinion on where the primary burden of tax administration should and does lie. From time to time, however, the Court has made statements inconsistent with its previously indicated trend toward liberality. In *Waldheim v. Tax Commission*, it was said:

"The Court has uniformly given the statutes granting power to various boards and commissions to administer the laws of this state a liberal construction to effectuate their purposes This must be so if such business is to be carried on efficiently. These bodies are better situated to carry out the details of administration than are the courts."¹⁸

Also, in *Motors Acceptance Co. v. Tax Commissioner*, the Court stated:

"Of necessity the details of the administration of the income tax law must be left to the determination of the Tax Commission and its staff, who possess expert knowledge with reference to the problems of taxation which is not possessed either by the legislature or the courts."¹⁹

In a more recent decision it was held: "Administrative agencies have only such powers as are expressly granted to them or necessarily implied, and any such power sought to be exercised must be found within the four corners of the statute under which the agency proceeds."²⁰ In the latest statement of policy by the Supreme Court of Wisconsin in the case of *Village of Plain v. Harder*, Chief Justice Fairchild, in resolving a situs of income problem under Sec. 71.07(1) and Rule 116, declared:

"The Wisconsin Department of Taxation has no lawful power to enact any such legislation. This, we say, *is* enactment. It is legislation. This is the determination of situs for taxation purposes. This is the passing of substantive law. This is *not* a rule of *procedure*. This is not 'implementing' a statute. This is *making* a statute."²¹

¹⁷ WIS. LEGIS. COUNCIL, 1955 Report, Vol. II, Part I, p. ii.

¹⁸ 187 Wis. 539, 204 N.W. 481 (1925).

¹⁹ 193 Wis. 41, 214 N.W. 64 (1927).

²⁰ *American Brass v. Board of Health*, 245 Wis. 440, 15 N.W.2d 27 (1944).

²¹ 268 Wis. 507, 68 N.W.2d 47 (1955).

In this case, the Department had included highway construction under the heading of "manufacturing or mercantile," but this was held to be outside the power of the Department. Even granting to Chief Justice Fairchild the correctness of the decision on the particular facts, it is submitted that the Court here would limit the power of the Department of Taxation to those situations in which authority to make interpretations only has been expressly delegated. There is readily apparent an implied holding that legislative rules will be severely dealt with. The substantive law of *Village of Plain v. Harder, supra*, has been changed by an amendment to Sec. 71.07(1)²² which now includes *all* businesses. It remains to be seen whether or not the restrictive attitude of the Court with relation to administrative power will be adhered to.

III. EFFECT OF ADMINISTRATIVE RULES

Ideally, an agency administering income tax statutes should operate with maximum efficiency to produce rules which result in optimum flexibility and certainty. In theory, maximum efficiency would demand the best possible service and operation with adequate manpower and facilities to accomplish the general purposes. However, with the modern-day cost of governmental operation at an extremely high level, many corners must be cut and limitations imposed on the administrative branch of government. This, of course, will force a reduction of efficiency to the level of what is practical financially.

As stated before, the rules themselves should result in both flexibility and certainty. Flexibility here means the free change of rules to meet the demands of changing situations. Certainty means a high degree of dependence which can be placed on existing rules by the public. It is apparent that we can never have the maximum degree of both of these key factors. An increase in certainty will decrease maximum flexibility. The converse is also true. Therefore, it is up to the legislature to reconcile these two factors into a solution which affords the best possible resolution of our tax administration problems.

A. **Flexibility.** Much difficulty has arisen in the past in connection with the adoption, changing, or repeal of a rule. The methods of carrying out such actions were not clearly defined by the Legislature, resulting in slow changes by the agency and little or no opportunity for those governed to contribute their voices. In order to alleviate some of this difficulty, the Legislature passed several new sections of the Administrative Procedure Act during the 1955 session. The general reasons for these changes can be found in the LEGISLATIVE COUNCIL REPORT.

"... in a democracy, the governed should have opportunity to participate in their government, either personally or through

²² Ch. 67, LAWS OF 1955.

their chosen representatives. It has been said in reply that administrative rule making is not analogous to legislation — that legislators have almost unlimited discretion in their policy making while the administrator's discretion is confined within limits prescribed by the legislature. To anyone who has examined the frequently broad delegations of rule-making authority to administrative agencies, however, the difference between the discretion exercised by the legislature in its policy making and the administrator in his policy making is a matter of degree. The theoretical argument of 'democracy' therefore would seem to be relevant to administrative rule making as well as to legislation.

Apart from theoretical arguments, there are practical considerations favoring provisions for interest group and public participation in rule making. These fall under two major headings. The first relates to informed administrative action. Informal group contacts, advisory committees, public hearings, and other similar devices provide a valuable source of factual information which can serve as a basis for the agency's rules. The second relates to satisfying those who will be affected by the proposed rules that their interests have received full consideration — an educational or public relations function. Good public relations, while not essential to the adoption of a rule, are essential to the successful operation and enforcement of a rule."²³

This quotation indicates the Legislature's feeling that rule making should be freely instituted by both the agency and those affected by its rules. Specific limitations have been established which will restrict free change, but under the new law there will probably be a superior overall handling of rule changes.

Under present law, "any municipality or any five or more persons may petition an agency requesting the adoption, amendment, or repeal of a rule."²⁴ The agency may deny the petition, by giving its reasons in writing, but if it accepts it must proceed under Sections 227.02-227.024. These latter statutes are the new notice, hearing, and filing laws. These replaced old Section 227.04²⁵ which authorized agencies to prescribe procedure for the submission and disposition of such petitions. The Council report credits the change to the failure of agencies to prescribe such rules under the old law, thus rendering it ineffectual.

In addition, an agency may itself take the initiative in rule making. Under Sec. 227.02 the agency *must* precede any rule making (which includes amendment or repeal of an existing rule under Sec. 227.01-(3)) with notice and public hearing, with several important exceptions. These are:

²³ WIS. LEGIS. COUNCIL, 1955 Report, Vol. II, Part II, p. 79.

²⁴ WIS. STATS. (1955) §227.015.

²⁵ WIS. STATS. (1953).

When:

1. The proposed rule is procedural rather than substantive. (These are generally not of a controversial nature or of sufficient public interest to justify the expense involved.)
2. The proposed rule is designed solely to bring an existing rule into conformity with a statute which has been changed or adopted since the adoption of the rule, to bring the existing rule into conformity with a controlling judicial decision, or to comply with a federal requirement. (This exception is made because the agency has little or no discretion in making the change.)
3. The proposed rule is a valid emergency rule. (This subsection will be applicable only on rare occasions, if at all, in the income tax field.)
4. The proposed rule is a change of general policy as defined in Sec. 227.01(4). (These statements of general policy vary so widely in content that the Legislature left this restricted area to the discretion of the agency.)
5. The proposed rule is published in the notice section of the ADMINISTRATIVE CODE together with a statement that the rule will be adopted unless twenty-five or more interested persons, a municipality, or an organization petition for such hearing. (This will allow the agency to eliminate many unnecessary hearings.)

The 1955 LEGISLATIVE COUNCIL REPORT, in its findings, stated that the Department of Taaxtion has never held a public hearing on rule making. The reasons for this, discovered by conference with the Department were:

1. No statutory requirements.
2. The expense and time elements.
3. The specialized nature of the subject.
4. Judicial remedies were adequate.
5. The informal conference was better.
6. Impracticality of public hearing.²⁶

Apparently the Legislature felt that the Department of Taxation, even with the highly specialized nature of its works, should follow the notice and hearing requirements as now contained in Sec. 227.02. Therefore, the Legislature has sacrificed some of the optimum flexibility to gain better general administration of the law.

An important factor in this field is retroactivity, the question of whether an agency can adopt a rule which applies retroactively. This particular problem has been the subject of much comment and criticism by such men as Dean Griswold and Professor Davis.

1. **Retroactive legislative rules** — Davis states that these retroactive rules are generally permissible under the CONSTITUTION, but points out that retroactivity is not favored. He suggests that these

²⁶ WIS. LEGIS. COUNCIL, 1955 Interim Report, No. II, p. 111.

rules should be tolerated only when specifically authorized.²⁷ Griswold flatly remarks that there should be no power in the Commissioner to make retroactive legislative rules.²⁸ It would seem that Wisconsin, under Sec. 227.026, has chosen not to allow retroactive legislative rules. The Statute provides that rules become effective on the first day of the month following proper publication. This Statute, if strictly construed, would aid the practicing attorney in his attempt to plan a client's tax program.

2. **Retroactive interpretative rules** — Davis and Griswold agree that interpretative rules may be effective retroactively. "Whenever interpretative rules do in fact create new law, retroactive law-making should be dealt with as such, unprejudiced by the false notion that results never flow from the interpreter. Problems of retroactivity, then, will be solved on the basis of ideas of fairness and the necessities of practical administration."²⁹ Griswold is an advocate of the view that an interpretative rule should be freely amendable in the early days of its life, and untouchable retroactively after it has become seasoned.³⁰ This latter view is an excellent ideal and would provide the taxpayer with a definite set of standards which he could follow safely, unless and until the time came when the law itself was changed. It remains to be seen whether Sec. 227.026 will be construed to permit retroactive interpretative rules.

B. **Certainty.** Another important problem is that of predicting the future of an existing rule. The tax attorney's approach to this problem must be a practical one. The attorney may ask, "Suppose I advise my client that this rule is not good law? How can I be sure? Or, if I choose to rely on this rule, how do I know that the court won't throw it out at the first opportunity as invalid?" The best answer, of course, is a speedy determination of the validity of the rule. "Invalidity" is defined in Sec. 227.05(5) as a violation of constitutional provisions, a failure to remain within the statutory authority, or an adoption without compliance with statutory rule making procedure. The provisions of this definition are not conclusive, however. It seems clear that this definition would make an excessive use of some delegated power invalid. One must look, however, to Sec. 227.014-(2)(a) for a definition of invalidity of an interpretative rule. "Each agency is authorized to adopt such rules interpreting the provisions of statutes enforced or administered by it as it considers to be necessary to effectuate the purposes of the statutes, but such rules are not valid if they exceed the bounds of correct interpretation."

²⁷ Davis, *ADMINISTRATIVE LAW*, (1951), §56.

²⁸ Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398 (1941).

²⁹ *Supra*, n. 27.

³⁰ *Supra*, n. 28.

The ways in which the validity of a rule may be attacked on the judicial level are found in Sec. 227.05. This is, for the most part, a new Section which attempts to clarify the law of judicial consideration of administrative rules. The first and most important means of judicial review is found in Sec. 227.05(1). This provides for an action for declaratory judgment in the Dane County Circuit Court and reflects the statutory change from a *petition* for declaratory judgment to the usual *action* for declaratory judgment. Before the court must render a judgment, there must be an interference or impairment of a right, present or threatened. This would indicate that the taxpayer may institute these proceedings at a very early stage of the process, perhaps even before he actually files his return. This would have some definite advantages to the taxpayer. He would be able to avoid any penalties for not paying his tax on time, and would be able to put an alternative plan into operation if his theory is incorrect. However, there are probably some important disadvantages. The taxpayer runs the risk of calling the attention of the Department to the particular item. This would be particularly true in matters dealing with inclusions in gross income. Presumably, the Department will catch all deductions from gross income, but may not notice an omission from the total gross income. Therefore, it would be up to the individual taxpayer to decide whether or not to gamble on the correctness of his own judgment concerning the validity of a rule. The taxpayer may go directly to the court, bypassing any petition to the agency, if he chooses to obtain a declaratory judgment. The *only other means* of obtaining judicial determination of the validity of a rule are found in Sec. 227.05(3). These are:

1. In a civil proceeding by the state to enforce a statute or to recover thereunder, provided such proceeding is not based on a matter for which the adverse party is accorded an administrative or judicial review and such adverse party has failed to use such right to review so accorded.
2. In criminal proceedings.
3. In proceedings for violation of county or municipal ordinances.
4. In habeas corpus proceedings.
5. In proceedings under Secs. 227.15-227.21 for review of decisions and orders of agencies, provided the validity of the rule involved was duly challenged in the agency proceeding in which the order or decision sought to be reviewed was made or entered. (The Department of Taxation is expressly excluded from these provisions, as seen in Sec. 227.15.)

It seems, however, that the taxpayer can also make use of the so-called common law extraordinary writs as they have been expressly preserved in the WISCONSIN CONSTITUTION, and therefore cannot be

changed by statute.³¹ It is submitted that these writs will be used but rarely, and for the purpose of this report they will not be expressly dealt with as remedies available to a taxpayer.

Because of the unique separation of the taxing authority of the state into a Department of Taxation and a Board of Tax Appeals, a further investigation of the process of review of rule validity is merited. The issue resolves into the question, "Does the B.T.A. have the jurisdiction to decide a question of rule validity?"

"Prior to the enactment of Ch. 412, LAWS OF 1939, the Wisconsin Tax Commission exercised administrative powers and exercised quasi-judicial functions by holding hearings for review as provided by law. In 1939, the Legislature created two separate and distinct departments. The administrative work was placed in the Wisconsin Department of Taxation, and the quasi-judicial functions were transferred to the Wisconsin Board of Tax Appeals It was not the intention of the Legislature to grant to the Wisconsin Board of Tax Appeals any supervisory right or authority over the administrative functions of the Wisconsin Department of Taxation."³²

Sec. 227.05 provides the *exclusive* means of judicial review of rule validity. Therefore, on a question of rule validity, is the B.T.A. precluded from deciding such a question by Sec. 227.05? Would a B.T.A. review of the validity of a rule be a judicial review within the meaning of Sec. 227.05, or would it be an administrative review? The powers of the B.T.A. are found in Sec. 73.01(5), and are there specifically enumerated. Despite the report's statement, "No statutes provide the procedure for administrative review of rules of the Department of Taxation, except the provisions of Ch. 227 which apply to all agencies,"³³ it would seem that the B.T.A. may accord an administrative review to a question of rule validity without any authorization in Ch. 227.³⁴ Sec. 73.01(5)(a) gives the B.T.A. authority to review determinations of the Department of Taxation which aggrieve the taxpayer. It is submitted that if the validity of a rule underlies such a determination, it may be considered by the B.T.A. under the general authority of this Section.

However, if the taxpayer appeals the B.T.A.'s decision on rule validity to the appropriate circuit court under Sec. 73.015(2), it is not clear whether this particular circuit court can examine the B.T.A.'s decision on rule validity. The taxpayer may have to move for a stay of proceedings and remove to the Dane County Circuit Court for a

³¹ WIS. CONST. Art. VII §§3 and 8.

³² *Kaukauna v. Department of Taxation*, 250 Wis. 196, 26 N.W.2d 637 (1947).

³³ WIS. LEGIS. COUNCIL, Interim Report, p. 113.

³⁴ *Adelman*, 2 WBTA 404, (1946). Even though this particular case was decided on a different issue, the question of rule validity was brought up and considered, by implication, a proper issue for the B.T.A. to decide.

declaratory judgment. This necessarily complicates the procedure for review and may discourage practitioners from appealing a single issue of rule validity to the B.T.A.

The B.T.A. administrative review would appear to be the route which will be selected when there are additional issues to be considered along with the issue of rule validity. Where the only issue is the validity of a particular rule, the declaratory judgment has the advantages of speed and simplicity of procedure.

There are also three principles which the courts have used to various degrees in deciding the validity of a particular interpretative rule. These are:

1. Contemporaneous interpretation by those familiar with legislative intent — Legal writers feel that the law is, in fact, being written, or at least is contributed to, by the same men who introduce new rules at substantially the same time as the new law. This factor could easily be applied by our courts in determining the weight of our interpretative rules where the Department of Taxation has participated to a large degree in the formulation of the law.

2. Long-standing interpretations — Professor Davis lists three reasons for respecting long-standing rules.

- a. Need for predictability.

- b. Widespread reliance on the customary practice.

- c. Harshness of upsetting retroactively the accepted law.³⁵

Griswold feels that this is the most important principle of construction. "When a regulation has remained unchanged for many years, without contest or alteration, it seems obviously bad tax administration to substitute the Court's construction of the statute for the administrative interpretation which has been relied on for so long a time."³⁶ From a practical viewpoint, this would seem to be the only fair attitude which the courts could adopt. However, in *Koshland v. Helvering*, a sixteen year old Federal regulation was nullified by an opposite interpretation by the Court.³⁷ On the other side is the much criticized case of *Helvering v. Winnill*,³⁸ which stated:

"Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the force of law."

It is submitted that a tax rule of long standing in Wisconsin should be weighed heavily by our courts in considering the merit of the Department's interpretation.

³⁵ Davis, ADMINISTRATIVE LAW, (1951), sec. 56.

³⁶ *Supra*, n. 28.

³⁷ 298 U.S. 441 (1936).

³⁸ 305 U.S. 79 (1938).

3. **Re-enactment**—This is an area of much confusion on the level of federal tax rules. The Supreme Court of the United States has laid down a precedent in *Helvering v. Winmill*,³⁹ that an interpretation after re-enactment "is deemed to possess implied legislative approval and to have the effect of law." However, in a later case,⁴⁰ the Congress had specifically considered the administrative interpretation and a Treasury proposal for change, but had re-enacted the statute without change. Here the U.S. Supreme Court adopted the view Congress had *rejected*. A stronger case for applying the re-enactment rule rarely occurs. Mertens criticizes this rule as "archaic fiction." ". . . to suppose that Congress must correct each mistaken construction under the penalty of otherwise incorporating it into the fabric of the statute appears unwarranted."⁴¹ Mertens sees the problem that this policy of re-enactment would cause frequent revisions, resulting in a statute so detailed and specific as in turn to lead to further construction problems.

"In complex income tax statutes it is absurd to indulge in the fiction that the full import of the Commissioner's regulations and administrative practice is known to the members of Congress, burdened as they are with the necessity of formulating legislation affecting many other complicated matters."⁴²

It is to be hoped that the Wisconsin courts will pay little heed to the so-called re-enactment rule, but that they will weigh long-standing and contemporaneous rules more heavily in considering the effect of a rule.

The tax attorney may have another question, "What should I advise my client to do when I take no issue with the validity of the rule as such, but rather question its applicability to a particular fact situation?" A finding by the Department of Taxation that a particular rule is applicable to a certain fact situation will be made in either of two ways:

1. When a taxpayer petitions for a *declaratory ruling* under Sec. 227.06.
2. Where the Department of Taxation makes a deficiency or additional assessment against a taxpayer based on a certain rule.

Both of these methods result in a *decision* by the Department.⁴³ The procedure for review of *decisions* of the Department of Taxation is

³⁹ *Ibid.*

⁴⁰ *Helvering v. Clifford*, 309 U.S. 331 (1940).

⁴¹ Mertens, *FEDERAL INCOME TAX*, §3.20 ff. (1942).

⁴² *Ibid.*

⁴³ WIS. STATS. (1955) §227.06. "A ruling other than one made upon a reference under Sec. 227.05(2) shall be subject to review in the circuit court in the manner provided for the review of administrative *decisions* in contested cases." (emphasis added)

found in Sec. 227.15, which states that the *decisions* of the Department of Taxation (among others) which directly affect the legal rights, duties or privileges of any person, whether affirmative or negative in form are *excluded* from the provisions for judicial review of Chapter 227. This section indicates that there is a different procedure to be followed in seeking judicial determination of decisions of the Department of Taxation. This statutory method is found in Sec. 73.01-(5)(a) which states:

“Subject to the provisions for judicial review contained in the statutes, the board (board of tax appeals) shall be the final authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state, except such as may be otherwise expressly delegated.”

Therefore, when an attorney seeks to determine whether a particular rule is applicable or not, he must take an additional step before he can appeal to a court. He must first appeal to the B.T.A., and plead his point there. If unsuccessful there, he may proceed to judicial determination.

It is clear that a determination made by the B.T.A. regarding either validity or applicability is subject to the review provisions of Sec. 227.16, as it is not expressly excluded from its provisions by Sec. 227.15. Therefore, in the typical case, where a taxpayer and the Department are in disagreement over the taxability of certain income, where the alleged taxability is based on a rule, the taxpayer has a choice:

1. He can immediately start an action for declaratory judgment in the Dane County Circuit Court under Sec. 227.05(1) to gain judicial interpretation of the validity of the rule.
2. He can appeal the decision of the Department either as to validity or applicability, making him liable for the amount disputed to the B.T.A., hoping for a reversal there. If he loses at this level, he can still continue to challenge the rule in his appeal from the B.T.A. to the circuit court of his home county under Sec. 227.16 and Sec. 73.015(2).
3. He can pay the additional assessment and file a claim for refund with the Department. If refused here, he must appeal to the B.T.A. From this point, if the taxpayer is not a corporation, he may appeal to the circuit court of his home county under authority of Sec. 73.015(2). Assuming this to be the case, and if the question of rule validity were to come up, the taxpayer would move for a stay of proceedings and remove to the Dane County Circuit Court for a declaratory judgment. This is found in Sec. 227.05(4).

It seems clear from a careful reading of the pertinent statutes that the taxpayer must assert the invalidity of the particular rule at his earliest opportunity and keep on asserting that fact until he eventually gets

judicial interpretation of the rule. Sec. 227.05(3)(e) requires a duly taken challenge to the rule in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered. Subsection 3(a) of the same Statute indicates that the taxpayer cannot sit back and wait for the Department to sue him in a civil action. If the taxpayer has not taken his authorized administrative or judicial review, he will most probably be estopped from asserting the invalidity of the rule in question. It is clear that the Legislature had an estoppel theory in mind in adopting this Section when one reads Sec. 227.05-(4)(3), which expressly provides an estoppel on the part of the taxpayer to plead the invalidity of the particular rule. In summary it appears that the method which affords the fastest answer to a question of validity of a tax rule is the declaratory judgment procedure under Sec. 227.05(1).

IV. CONCLUSION

It seems readily apparent that the Department of Taxation has the necessary authority to take the primary position in influencing future tax administration in Wisconsin. The Legislature has enacted several carefully drawn provisions which are designed to accomplish many purposes. Foremost among these are:

1. Limiting administrative discretion without impairing effective administration.
2. Opportunity for the public to be familiar with all administrative rules.
3. Opportunity for the public to participate in rule-making.

When one considers these general purposes with the 1955 changes in the Wisconsin Administrative Procedure Act and relates them to administrative rule-making, it seems clear that the practice of tax law has been asked to take a definite step forward. As the rules are now being published in the new ADMINISTRATIVE CODE, the practicing attorney will be able to keep his knowledge current, and his client's particular problems in the tax area will be capable of readier solution. An attorney can now:

1. Petition directly to the Department of Taxation to change, adopt, or repeal a rule.
2. Appear and argue fully before the Department of Taxation before a rule is adopted, amended, or repealed.
3. Obtain judicial construction quickly by starting an action for declaratory judgment in the Dane County Circuit Court.

These are important steps in the establishment of a better tax program in Wisconsin.

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